

Emery's Tin Shop, Inc. and Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters & Joiners of America, AFL-CIO. Case 6-CA-22928

March 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On October 15, 1991, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Emery's Tin Shop, Inc., Brookville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Sandra Levine, Esq., for the General Counsel.
Sharon L. Smith, Esq., of Brookville, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. Original and amended charges in the above case were filed by Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union or Charging Party), against Emery's Tin Shop (Employer or Respondent). A complaint thereon issued on October 5, 1990, alleging that Respondent coerced its employees in violation of Section 8(a)(1) of the Act by certain threats, interrogation, and other unlawful conduct. The complaint also alleges that Respondent violated Section 8(a)(3) of the act by discharging employees Byron Powell and Dallas Skinner.¹ An answer thereto was timely filed by Re-

¹ The complaint was amended at the hearing to reflect the following corrections in name spelling:

spondent. Pursuant to notice, a hearing was held before the administrative law judge on February 13, 1991. Briefs have been timely filed by Respondent and General Counsel which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer is a Pennsylvania corporation engaged in the installation and fabrication of roofing, heating, and sheet metal products in Brookville, Pennsylvania. During the 12-month period ending July 31, 1990, Respondent received products, goods, and materials valued in excess of \$50,000 at its Brookville, Pennsylvania facility directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answers admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts²

1. Supervisory status of Sandra Reitz

Sandra Reitz is the wife of Bill Reitz, the owner. With respect to the matter of her authority and duties, it appears that she runs the shop office with the help of another female office employee. According to Bill Reitz, he assigns the work, however, when a job is finished, Sandra Reitz has the authority and, in fact, does assign employees to other waiting jobs, according to their ability, to finish up their day's work. Although Bill Reitz testified that he was the only company official with the authority to assign work, Sandra Reitz did not testify at the hearing and I am satisfied that the testimony of Powell and Skinner accurately describes Sandra Reitz' supervisory responsibilities. That authority, and the exercise of that authority, together with the apparent authority she conveys as wife of the owner, are sufficient to satisfy me that Sandra Reitz is an agent of the Respondent within the meaning of Section 2(2) and (13) of the Act whose actions are imputable to Respondent. In addition, it also appears, based on the probative evidence set out above, that Sandra Reitz,

Par. 6(a)—Reitz corrected to Reitz.

Par. 10—Darrell corrected to Powell.

² There is conflicting testimony regarding some of the allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically on his demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco Inc.*, 159 NLRB 1159, 1161 (1966).

on her own authority, assigns work to employees and is a supervisor within the meaning of Section 2(11) of the Act.

2. Allegations of coercion and discrimination

As noted above, Respondent is a roofing contractor located in Brookville, Pennsylvania. Respondent employs about 18 employees who operate in crews of varying numbers, depending on the nature of the work. On about June 18, 1990,³ Powell was employed on a crew working in Franklin, Pennsylvania. The crew was approached by Richard Bunch, a special representative for the Union, who inquired about their interest in being represented by a union. On receiving an affirmative response, a meeting of Respondent's employees was arranged for June 25 at the L & B Tavern in Brookville. This meeting, led by Bunch, was attended by some nine employees, including Powell and Skinner. All those in attendance signed union authorization cards and returned them to Bunch. A petition for election was filed by the Union on June 28.

On June 26, the day following the meeting at the L & B Tavern, Bill Reitz, Respondent's principal owner, called a meeting of employees at the shop. At this meeting, according to Powell, Reitz told the assembled employees that the economics of the areas would not support an organized operation; that he would not be able to compete; that if the business were organized, it would be necessary for him to shut down the business and that he had enough money and could retire. He asked those present if they had attended a union meeting; he asked where. Those who indicated that they had were asked if they had signed a union authorization card. Those questioned responded either affirmatively or negatively.

Reitz' version was that he told the employees that he had no objection to the Union but that union wage rates were not affordable in a small town and he asked them whether or not their families could afford a union wage rate for their services. Whatever else Reitz may have said to the employees, the corroborated testimony of Powell, Skinner, and ex-employee John White satisfy me that Powell's account is essentially credible.

Prior to the Union's organizational effort, Powell was paid an hourly rate of \$8 per hour. In early July, after the petition had been filed and the election was pending, Powell was told by Bill Reitz that he was being given a raise to \$9 an hour for being helpful to management and showing leadership qualities. About 2 weeks later, Reitz told Powell that because of his improving skills and leadership, he was being given another \$1 raise to \$10 per hour and that another employee, Carl Deibler, was also being raised to \$10 per hour, adding that his raise was not to influence his vote in the upcoming union election, but rather because of his skills in leadership. It is undisputed that there was no regular basis for wage reviews or granting wage increases. Reitz concedes granting Powell a wage increase, although Powell never actually received it because he was working on a "prevailing wage rate" job at the time which paid more than \$10 an hour and he was discharged before actually receiving the increases in his pay.

Similarly, Skinner was also told by Reitz that he was going to receive a raise to \$8.50 per hour; that he deserved

it and that it had nothing to do with the Union. At the same time, Skinner's un rebutted testimony discloses that Reitz added that he thought that he and Powell were the "instigators of this whole union affair and we had better stop rallying the troops or he was going to have to let us go." The parties stipulated that company payroll records do not indicate that Skinner was given a pay increase. Like Powell, Skinner testified that he was being paid more on a "prevailing wage rate" job at the time of the increase, and was discharged before receiving the increase in his pay. With respect to Skinner, I am satisfied, having reviewed the relevant testimony, that Reitz did advise Skinner that he would be receiving a wage increase. John White also testified that about 2 weeks before the election, he was given a wage increase to \$4.50 per hour. Except as to Skinner, Reitz concedes granting wage increases to employees based on merit.

In late July or early August, White was working at the shop premises with Jess Barnett, another employee. They were engaged by Sandy Reitz in conversation. Reitz asked them how they planned to vote at the upcoming election. Barnett replied that he was going to vote against the Union and White stated that he did not know yet. Reitz went on to tell them that if the Union were elected, her husband, Owner Bill Reitz, would have to shut the doors or retire because they would not be able to get the high prices they would have to charge for their work if they were unionized. During this same conversation, Reitz also advised them that work would be reduced because union organization would force them to raise their prices. This testimony is un rebutted since neither Barnett nor Sandy Reitz testified at the hearing.

The election was held on August 8 from 7 to 7:30 a.m., preceded by a preelection conference attended by Powell as the union observer, Sandy Reitz as the company observer, the Board agent, and Bill Reitz. The Union was represented by Dick Bunch and two other union officials. Bill Reitz addressed the union representatives, telling them that they were trespassing on private property and that if they did not leave, he would call the police and have them arrested, whereupon the Board agent told Reitz that they were entitled to be there until the vote began, and they did remain.

After the election and following the tally of ballots,⁴ Reitz called the employees into his office. He announced to those assembled that there had been thefts from the Company and that he was firing Powell and Skinner for those thefts. Further, that anyone who wanted could join them in unemployment or could go to work. Powell and Skinner waited to receive their paychecks and then left the premises. It also appears, according to Sergeant Donald Siple of the Brookville Police Department that shortly before 8 a.m., Bill Reitz called the police station requesting a police officer at the premises because he intended to fire two employees and that there might be trouble. An officer was dispatched. Shortly thereafter, Siple received a telephone call from Sandra Reitz. Siple testified, "She indicated to me that she wanted me to reinstitute charges against Byron Powell and Dallas Skinner and I asked her what for and at that time she said they were very instrumental in getting a union vote and that if they were going to cause Bill problems, Bill is going to cause

³ All dates refer to 1990 unless otherwise indicated.

⁴ The Union won the election.

them problems.”⁵ On August 9, Powell was notified of private criminal charges filed against him. On December 14, Powell pleaded *nolo contendere* to a misdemeanor charge of theft by unlawful taking and was fined \$150 and costs of \$66.⁶ Private criminal charges against Skinner were dropped during a preliminary hearing before a magistrate.

In late August, a couple of weeks after the election, Skinner was called at home by Bill Reitz. According to Skinner, they discussed the Union being in the shop and Reitz told him that if he were willing to sign a paper disavowing the Union; that he did not know what he was signing, he could return to work and the criminal charges would be dropped. Skinner responded that he was willing to return to work but would not sign anything. Reitz denied that the conversation ever took place. However, I credit Skinner's testimony in this regard based on a review of the relevant testimony and the credibility criteria set out above.

B. Analysis and Conclusions

1. The 8(a)(1) allegations of coercion

Having credited the General Counsel's witnesses concerning Bill Reitz' address to the employees on June 26, I further conclude that these remarks constitute coercion within the meaning of Section 8(a)(1) of the Act. There can be no doubt that threatening to close a plant if it selects union representation is a threat of imminent job loss and the nonspecific statements by Reitz to the effect that the expenses of being organized would require him to close do not insulate those remarks. It was also clearly unlawful interrogation for Reitz to have questioned employees about their attendance at a union meeting and the signing of union authorization cards.

I have concluded that in late June, Bill Reitz told Skinner that he believed that he and Powell were the instigators of the union organizational effort. This remark does, in fact, suggest that the union activities of both Skinner and Powell were under surveillance. This is the natural inference to be drawn from that remark since that would be the obvious way to obtain information about Skinner and Powell as “instigators.” During this same conversation, Bill Reitz told Skinner that he and Powell had better stop rallying the troops or face discharge. This is a clear threat of termination for exercising the organizational rights guaranteed to employees in Section 7 of the Act.

It is undisputed that wage raises were given to employees during the Union's organizational campaign and that wage increases were not granted on any regular basis. Despite Respondent's contention that the raises were unrelated to union organizational activity, there is an obvious inference that Respondent is the source of this benefit and has the power to withdraw such benefits in the event that Respondent's inter-

ests are not satisfied. The granting of such wage increases violates Section 8(a)(1) of the Act. As to Sandra Reitz' conversation with White in early August, it is undisputed that Reitz asked White and another employee how they planned to vote and that higher prices occasioned by the union organization would cause her husband to close or retire and result in reduced work for the employees. These interrogations and threats to close or reduce the work being done were unlawful and coercive since, like similar remarks made by her husband earlier, both constitute interference with the organizational rights of employees guaranteed by Section 7 of the Act.

Moving to August 8, at the preelection conference, Bill Reitz threatened to arrest and prosecute the union officials who were there for the preelection conference. However, the record discloses that on advice from the Board agent conducting the election that they were entitled to remain until the election began at 7 a.m., Reitz acquiesced and they were allowed to remain. In my opinion, these remarks, despite the presence of a unit employee, were not coercive and did not interfere with the organizational rights of employees guaranteed in Section 7 of the Act.

After the election, Bill Reitz offered to reemploy Skinner and drop the criminal charges against him in exchange for his renunciation of the Union. Such inducements offered to employees unlawfully interfere with the Section 7 rights of employees to join, assist, and bargain through labor organizations.

2. The discharges of Powell and Skinner

The General Counsel contends that Powell and Skinner were discharged because they were active union supporters. The Respondent argues that their union activities were unrelated to their discharges and that their discharges were occasioned by their thievery. In my opinion, the reason advanced by the Respondent is a pretext and, in fact, both Powell and Skinner were discharged because of their union activity.

The record discloses that Powell and Skinner were among the first group who signed union authorization cards at a union meeting on June 25. Respondent became aware of their union sentiments almost at once because in a meeting with employees on the following day, he unlawfully interrogated them and they truthfully acknowledged their desire to bring in a union. Thereafter followed several instances of unlawful conduct by which Respondent, through its owner and his wife, unlawfully interfered with the organizational rights of employees, notably Powell and Skinner, and evidenced a clear antiunion bias.

On election day, immediately after the ballots were tallied, at a meeting of employees, Bill Reitz discharged Powell and Skinner, allegedly for theft of company materials which occurred on the previous May 23, well before the election and before the start of any union organizational effort among Respondent's employees. One must ask, why, even assuming that Powell and Skinner were involved in the theft, Reitz would allow them to continue working without filing criminal charges against them and then discharge them after they became active union supporters in a campaign that produced a union victory at the polls, and just minutes after learning that the Union had won. The timing of the discharges, standing alone, suggests that retaliation was the motive, but apart

⁵By way of background, it appears that on the previous May 24, following the theft of some roofing materials from a job where Powell and Skinner were employed, valued at \$376.34, an investigation was conducted by Siple which implicated Powell and another employee, Randy Carpenter, in the theft. No charges were filed, however, and Powell and Skinner continued to work for Respondent until their discharges on August 8.

⁶Powell testified that he paid the fine and costs rather than defend against the charges because any attorney would cost him more than the fine.

from that, Respondent has provided no satisfactory explanation for its conduct.

Respondent attempts to justify its position by contending that Reitz did not want to discharge them until after the election because it did not want to give the appearance of having discharged them for union activity. This does explain, however, why, if they were thieves, they were not discharged at the time of the thievery. The thievery was, in fact, condoned.⁷ The union organizational effort had not begun at the time of the theft. There was no need at that time to avoid the appearance of unlawful discharges that Respondent contends that it feared. The union organizational effort did not begin until some weeks later. Respondent also contends that Powell and Skinner were allowed to work, despite the thefts, out of deference to the fact that Powell's brother was his son-in-law, but that despite this compassion, thefts of company property continued. The record, however, apart from Bill Reitz' testimony, is totally devoid of any probative evidence to show either that the thefts did, in fact, continue and much less that either Powell or Skinner were responsible for them.

Finally, there exists direct evidence establishing the real motive for the discharges. In late June, Bill Reitz identified Powell and Skinner, as noted above, as the instigators of the union campaign and warned them to stop "rallying the troops" or face discharge. Again, it is un rebutted that Sandra Reitz, in seeking to revive the charges against Powell and Skinner, explained to Sergeant Siple that it was being done in retaliation for their union efforts. These events establish a clear antiunion motivation on the part of Respondent in discharging Powell and Skinner.

In applying the mandatory *Wright Line*⁸ rationale to the instant case, it is apparent that the General Counsel has met its burden of making a prima facie showing to support the inference that the union activity of Powell and Skinner was a motivating factor in Respondent's decision to discharge them. I further conclude that Respondent has not met its burden of demonstrating that it would have discharged them even in the absence of their union activity. Accordingly, I conclude that Powell and Skinner were discharged because of their union activity in violation of Section 8(a)(3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with the Respondent's operations described in section I above, have a close and intimate relationship to traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action

designed to effectuate the policies of the Act. I have found that Respondent discharged Byron Powell and Dallas Skinner for reasons which offended the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided, with interest, shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Sandra Reitz is an agent of Respondent within the meaning of Section 2(13) of the Act and a supervisor within the meaning of Section 2(11) of the Act.

4. By coercing and interfering with the organizational rights of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By discharging Byron Powell and Dallas Skinner, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Emery's Tin Shop, Inc., Brookeville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they select union representation.

(b) Interrogating employees concerning their union membership, activities, and sympathies.

(c) Creating the impression among employees that their union activities are under surveillance.

(d) Threatening employees with discharge if they do not withdraw their support for the Union.

(e) Promising to rehire employees and withdraw criminal charges against employees in return for their written renunciation of the Union.

(f) Threatening employees with reduced employment if they select union representation.

(g) Granting wage increases to employees to discourage them from exercising their right to select union representation.

(h) Discharging employees in order to discourage their membership in or activities on behalf of Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

⁷The postelection offer to rehire Skinner and withdraw the criminal charges against him in return for his rejecting the Union suggests that Reitz did not regard the thefts as a bar to employment, thus suggesting that antiunion considerations motivated the discharges.

⁸*Wright Line*, 251 NLRB 1083 (1980).

⁹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Byron Powell and Dallas Skinner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any references to the discharges of Byron Powell and Dallas Skinner, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at its facilities at Brookville, Pennsylvania, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge if they select union representation.

WE WILL NOT interrogate employees concerning their union membership, activities, and sympathies.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT threaten employees with discharge if they do not withdraw their support for the Union.

WE WILL NOT promise to rehire employees and withdraw criminal charges against employees in return for their written renunciation of the Union.

WE WILL NOT threaten employees with reduced employment if they select union representation.

WE WILL NOT grant wage increases to employees to discourage them from exercising their right to select union representation.

WE WILL NOT discharge employees in order to discourage their membership in or activities on behalf of Carpenters District Council of Western Pennsylvania a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer to Byron Powell and Dallas Skinner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them.

WE WILL expunge from our files any references to the discharges of Byron Powell and Dallas Skinner, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

EMERY'S TIN SHOP, INC.